Petition

81-935

No.

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CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JEFFBOAT, INC. - - - - - Petitioner

versus

PAUL ROBERTSON, ADMR., etc. - - Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rule 28.1, Petitioner states that the parent company of Jeffboat, Inc. is Texas Gas Transmission Corporation. The following is a list of subsidiary and affiliated companies of Texas Gas Transmission Corporation:

All-American Redevelopment Corporation
All-American Transport, Inc.
Amcom, Inc.
American Carriers, Inc.
American Commercial Barge Line Company
American Commercial Credit Corporation
American Commercial Leasing Company
American Commercial Lines, Inc.
American Commercial Terminals, Inc.
American Freight System, Inc.
d/b/a American Freight System, Inc. of Delaware
d/b/a AFS Co.
d/b/a American (Texas) Freight System, Inc.
Atlantic Transport Service, Inc.
Bauer Dredging Co., Inc.
Commercial Barge Line Company
Commercial Carriers, Inc.
Commercial Carriers, Inc.
d/b/a Michigan Commercial Carriers, Inc.
d/b/a National Trucking Company
Culbac Corporation
Ferma Gro Corporation
Indiana Gas Utility Corporation
Inland Tugs Co.
Ken-Tex Energy Corporation
Louisiana Dock Company, Inc.
Mac Towing, Inc.
Midwest Coast Transport, Inc.
National Trucking Company
d/b/a Multi-Level Rail Car Service Company
Sioux Falls Service Center, Inc.
Texam Gas Transmission Limited
Texam Offshore Gas Transmission, Inc.
Texas American Corporation
Texas Gas Alaska Corporation
Texas Gas Development Corporation
Texas Gas Exploration Arctic, Limited
Texas Gas Exploration Corporation
Texas Gas Exploration (U. K.) Corporation
Texas Gas Exploration (U. K.) Limited
Texas Gas Synfuel Corporation
Texas Gas Western Pipeline Company
TransAgra Corporation
Transport Brokerage, Inc.
TXG Resources, Inc.

QUESTIONS PRESENTED FOR REVIEW

Petitioner submits that its application for a Writ of Certiorari to the Court of Appeals for the Sixth Circuit presents the following questions for review:

1. Whether the decision of the Court of Appeals effectively eliminates the exclusive remedy provisions for a maritime employer in §5 of the United States Longshoremen's and Harbor Workers' Act, 33 U.S.C.A. §905, by holding a shipbuilder liable in tort for a simple failure to provide a safe working environment for its employees.

2. Whether knowledge of employees engaged in vessel construction is properly imputed to their employer so as to impose on that employer, in its alternative status as owner of the hull under construction, a duty to remedy hazards in the work place.

3. Whether mere knowledge of any hazard in shipbuilding activity necessarily imposes a duty on the vessel owner to intervene in that activity to remedy the hazard.

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No.

JEFFBOAT, INC. - - - - - *Petitioner*

v.

PAUL ROBERTSON, ADMR., etc. - - *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DECISIONS BELOW

The opinion of the United States District Court for the Western District of Kentucky is not reported. The opinion of the United States Court of Appeals for the Sixth Circuit is reported under the title "Robertson v. Jeffboat, Inc.," at 651 F. 2d 434 (1981).

JURISDICTION

Petitioner seeks a Writ to the United States Court of Appeals for the Sixth Circuit to review its decision and order filed on June 19, 1981. An Application for Rehearing was denied by the Court of Appeals in an order entered on September 23, 1981. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

This Petition raises issues under the following provisions of the United States Longshoremen's and Harbor Workers' Compensation Act:

> Exclusiveness of liability
>
> (a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.
>
> (b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to

the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.
33 U.S.C.A. §905.

STATEMENT OF THE CASE

Plaintiff-respondent in this admiralty action is the administrator of the estate of William H. Robertson, a former employee of defendant-petitioner, Jeffboat, Inc. Robertson drowned after apparently falling into the Ohio River at approximately 10:30 P.M. on February 27, 1975. He had been working in a crew which was sandblasting a barge being built by his employer at its Jeffersonville, Indiana, facility. No one actually saw Robertson fall into the river. The testimony of his co-workers established that just before he disappeared Robertson had been on the barge participating in a sandblasting operation, straightening air lines

along the deck of the barge. He was last seen near the upstream end of the barge, and a few moments later, one of his fellow crewmembers realized that he had disappeared. A sandblasting hood which he had been wearing came to the surface at that end of the barge, but Robertson, himself, was never observed. His body was recovered several months later.

The barge on which the accident occurred was one of a series being built by petitioner Jeffboat pursuant to a contract with Louisiana Barge Company, Inc., of New Orleans, Louisiana. The terms of the contract called for payment of 25% of the construction price on execution of the contract and the balance on delivery of the barge. The particular barge from which Robertson disappeared was completed on March 6, 1975, seven days following the accident, and was delivered on March 13, 1975. The incomplete barge hull was personal property of Jeffboat at the time of the accident.[1] It was a standard, inland river cargo barge, which carried no crew of its own.

In his original complaint, plaintiff-respondent alleged that Robertson had been a member of the crew of the barge on which he had been working, and sought recovery under the Jones Act, 46 C.S.C. §688, for negligence, and under general maritime law for unseaworthiness of the barge. He also sued Louisiana Barge Company, alleging that it owned the barge on which the accident occurred. The trial court granted Petitioner's motion for summary judgment on the Jones

[1]It was never contemplated that Jeffboat would be the owner of the vessel after it was placed in commerce and navigation.

Act and general maritime law claims, but while the motion was pending, plaintiff amended his complaint to allege a claim against Jeffboat under §5(b) of the United States Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. §905(b). Plaintiff voluntarily dismissed his claim against Louisiana Barge Company. The district court retained jurisdiction of the remaining claim pursuant to 28 U.S.C. §1333.

The claim under the compensation act was tried to the court, sitting without a jury, and the court made Findings of Fact and reached Conclusions of Law on which judgment was entered in favor of plaintiff. The trial court found that Jeffboat had been negligent in failing to provide temporary lighting for the work area where the accident occurred and in failing to provide life rings or alarm devices in the vicinity. The testimony had established without dispute that temporary lighting was customarily provided by the shipyard as part of the services rendered to the vessel owner during construction or repair activity. There was no evidence to show that any such lights were kept aboard the barge, or that vessel owners customarily provided temporary lighting for use on an unmanned vessel. Damages were awarded by the district court to the plaintiff administrator for the benefit of the surviving parents of the deceased to compensate them for the loss of his society, *Sea Land Services, Inc.* v. *Gaudet*, 414 U. S. 573, 94 S. Ct. 806, 39 L. Ed. 2d 9 (1974), which damages were mitigated 50% for negligence of the deceased in failing to wear a life jacket.

The Court of Appeals for the Sixth Circuit affirmed the judgment of the district court based on its view of this court's holding in *Scindia Steam Navigation Co.* v. *de los Santos,* —— U. S. ——, 101 S. Ct. 1614, 68 L. Ed. 2d 1 (1981). The appellate court imputed to the defendant as owner of the incomplete hull the same knowledge that the shipbuilding crew had regarding lights and life rings, and then held that such knowledge created a duty to intervene in the shipbuilding operation to remedy the hazard which caused the accident. It concluded that failure to intervene was a breach sufficient to support the award of tort damages to the survivors of the deceased employee.

ARGUMENT

The United States Longshoremen's and Harbor Workers' Compensation Act provides that the obligation to pay the compensation benefits prescribed in the Act shall be the exclusive liability of the employer to its employee or his legal representative.[2] The decision of the Court of Appeals in this matter effectively eliminates the immunity from tort liability for a shipbuilder in those instances where injury occurs on a vessel under construction as a result of an unsafe working condition occurring in the construction process. The Court of Appeals reached that conclusion by a combination of two errors: First, by its failure to draw a distinction between the employer's capacities as builder of the vessel and as owner of the res under

[2] 33 U.S.C.A. §905(a).

construction; and, second, by its startling generalization of a vessel owner's duty purportedly drawn from this Court's decision in *Scindia Steam Navigation Co.* v. *de los Santos.* The Circuit Court's failure to draw the proper distinction between the separate capacities of the employer is in substantial conflict with decisions of the Second and Fourth Circuits as well as the congressional intent recorded in the legislative history of the statutory provision at issue. Its definition of the duty owed by a vessel owner to construction workers aboard his vessel is essentially at odds with the holding in *Scindia* and conflicts with definitions of that duty expressed by the Second and Fifth Circuits. For those reasons, a writ of certiorari should be issued to the Sixth Circuit to review these issues.

The evidence at trial showed beyond dispute that the accident which resulted in Robertson's death was caused concurrently by his own negligence and by a failure of his employer to provide temporary lighting in the work area that evening.[3] The night shift superintendent for the defendant Jeffboat testified that temporary lighting ordinarily was provided by the foreman of the working crew, and that fact was confirmed as consistent with industry practice by expert witnesses for the plaintiff as well as the defendant. The Safety & Health Regulations for Shipbuilding promulgated by the Occupational Safety & Health

[3]The trial court also found that Jeffboat was negligent in failing to provide life rings and alarm devices, but Robertson was never seen after he disappeared from the barge, and such a failure could not have caused his death.

Administration contain detailed requirements governing lighting, including temporary lighting, 29 C.F.R. §1916.52, and life rings, 29 C.F.R. §1916.84(c), as a part of the employer's duty to provide a safe place in which to work.

The evidence as to the practice of providing temporary lighting where necessary at Jeffboat, the evidence of industry custom, and the applicable regulations compel the conclusion that the inadequate lighting which contributed to this casualty was a breach of duty by the employer as builder of the barge. There was no opposing evidence to show practice, custom, or regulation requiring a vessel owner under these circumstances to provide the necessary lighting apparatus; indeed, plaintiff-respondent's expert witnesses specifically negated any such custom. Neither was there any evidence of knowledge of inadequate light at the work site on the part of Jeffboat's employees other than the members of the crew in which Robertson was working and the night shift superintendent.

This factual predicate raises the issue of interpretation and application of the provisions in the 1972 amendments to the United States Longshoremen's and Harbor Workers' Compensation Act which provide an exception to the employer's immunity from tort actions on behalf of its employees. Such actions had been allowed by decision of this Court in *Reed* v. *S/S YAKA*, 373 U. S. 410, 83 S. Ct. 1349, 10 L. Ed. 2d 448 (1963), and Congress added the following provision to the section governing employers' tort liability:

> If such person [an employee covered by the Act] was employed by the vessel to provide shipbuilding or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing shipbuilding or repair services to the vessel. 33 U.S.C.A. §905(b).

The legislative history[4] regarding that provision and the decisions of the Courts of Appeals interpreting it establish that a longshoreman, repairman, or shipbuilder retains the right to sue his employer in its capacity as owner of a vessel on which he works by treating the relationship between them as if he and his co-workers were employed by an independent contractor. The clear intent is to eliminate the inequity arising from literal application of the tort immunity provision where the employer also happens to own the vessel on which services are being rendered—the inequity which prompted the decision in *Reed* v. *S/S YAKA*.

The Second Circuit in *Smith* v. *Eastern Seaboard Pile Driving, Inc.*, 604 F. 2d 789 (1979), considered a claim against an employer-owner which raised the question of the nature of the negligence which had caused the death of an employee providing repair services. That court held that a determination must be made whether the negligence was "owner occasioned" as distinguished from negligent acts of co-employees also providing repair services.[5] The negli-

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[4]H.R. Report No. 92-1441, 1972 U.S. Code Cong. & Admin. News 4698, 4705.

[5]604 F. 2d at 795.

gent employees in *Smith* were members of the crew of a tug operated by their employer, and recovery was allowed. The same holding produced a different result on different facts in *Richardson* v. *Norfolk Shipbuilding & Drydock Corp.*, 621 F. 2d 633 (4th Cir. 1980). In that case the accident resulted from the negligent operation of a barge mounted crane by a co-employee engaged in repair work. Although the Sixth Circuit in this case acknowledged the distinction required by the holdings in *Smith* and *Richardson*, it nonetheless found the employer liable as owner of the barge notwithstanding the fact that the operative negligence arose out of the shipbuilding operation. It reached that result by adding a "common mind" theory to the determination:

> Because Jeffboat *is* both owner and employer, any knowledge chargeable to it as employer must also be attributed to it as owner. What the employer knew, the owner knew. 651 F. 2d at 436. (Emphasis in the original.)

In addition to charging Jeffboat as owner of the barge under construction with such knowledge as its employees engaged in building in the barge possessed, the Court of Appeals also read this Court's decision in *Scindia Steam Navigation Co.* v. *de los Santos* to hold that knowledge by an owner of a hazard in the independent contractor's operations necessarily gives rise to a duty on the part of the owner to intervene in that operation to remedy the hazard. The combination of the common mind theory and the standard of care that knowledge creates a duty to intervene produces a

practical result, not limited to this case, which will virtually eliminate the distinction between the ownership and service capacities of the employer mandated by the statute as recognized by the Second Circuit in its *Smith* decision and the Fourth Circuit in its *Richardson* decision. It also creates a new inequity now favoring the employee rendering services to a vessel owned by his employer by making every member of the stevedore gang or ship repair crew an agent of the vessel owner with regard to the knowledge factor in the standard of care formula. Employees of independent contractors would not enjoy that very genuine practical advantage.

This Court's decision in *Scindia Steam Navigation Co.* v. *de los Santos* stopped far short of setting a standard of care in terms expressed by the Sixth Circuit in deciding this matter. *Scindia* does not hold that a vessel owner is obligated to intervene in stevedoring or similar activities in all instances where it has knowledge of a safety hazard. Comparing this case to *Scindia* must start with recognition of significant factual distinctions affecting the duty imposed on the owner. In *Scindia* the injury was caused by a malfunction in the ship's gear which had existed when the stevedore commenced work.[6] This Court also noted that there was an inference at least that it was the

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[6]Actually, the evidence on the point was in dispute. Since the District Court had granted the owner a summary judgment, the plaintiff's version of the facts was assumed correct in deciding the legal issues. ____ U. S. at ____, 101 S. Ct. at 1618, 68 L. Ed. 2d at 7.

owner's responsibility under OSHA and Coast Guard regulations to perform the repairs necessary to eliminate the malfunction.[7] This case did not involve any equipment of the barge under construction; rather, it arose from a failure of the shipbuilding crew to set up the temporary lights which would have eliminated the hazard which came into being when darkness fell on the evening of the accident.[8] The OSHA regulations applicable here placed the obligation of alleviating that hazard on the employer in its shipbuilding capacity. Under the facts in *Scindia,* this court expressly rejected the Ninth Circuit's formulation of a duty to inspect and to supervise the stevedore activity as being too broad an interpreation of Section 905(b).[9] The holding of the Sixth Circuit here is, in all practical respects, a return to that overly broad standard, because knowledge of co-workers attributed to the employer as owner of the vessel which in turn gives rise to a duty to intervene must have that result. In short, the common mind theory amounts to a duty to discover the danger. If the vessel owner is going to be liable because his longshore employee had knowledge of a hazard which caused injury to a co-employee, the owner is compelled to inspect and to supervise the

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[7] ____ U. S. at ____, 101 S. Ct. at 1626-27, 68 L. Ed. 2d at 18-19.

[8] There is a single reference in the opinion of the Court of Appeals to guard rails. Although Plaintiff sought to establish liability on such a basis, the District Court did not find Jeffboat negligent in that respect.

[9] ____ U. S. at ____, 101 S. Ct. at 1622-24, 68 L. Ed. 2d at 13-15.

work or suffer the consequences in tort liability in addition to payment of compensation required by the Act.

The formulation of the standard of care set forth in the principal opinion in *Scindia* was that there are circumstances in which an owner has a duty to act where the hazard arises from the malfunctioning of the vessel's gear.[10] The particular circumstances which the Court pointed out were that the owner had actual or constructive knowledge of the malfunction and that there was an inference at least that it was the owner's responsibility in normal operations to repair its own equipment. Nothing in the principal opinion nor in either of the concurring opinions justifies the Court of Appeals' conclusion here that knowledge of a hazard and foreseeably of harm obligates the owner to act.

The result reached by the Sixth Circuit is very much at odds with holdings in other circuits on the obligation of an owner for injuries caused by the contractor's operations. In *Lubrano* v. *Royal Netherlands SS Co.*, 622 F. 2d 29 (1980), the Second Circuit held that the owner of a vessel was not responsible "for the contractor's defective machinery, equipment, or methods, or its negligent acts occurring as a detail of the work."[11] It also pointed out that the 1972 amendments to the Act removed the owner's non-delegable duty to provide a safe place to work and that making the owner responsible for the equipment and work methods of an independent contractor would be in-

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[10] ____ U. S. at ____, 101 S. Ct. at 1626, 68 L. Ed. 2d at 17.

[11] 622 F. 2d at 31.

consistent with the statutory intent. In *Lemon* v. *Bank Lines, Ltd.*, 656 F. 2d 110 (1981), the Fifth Circuit reviewed a claim by a longshoreman alleging improper stowage of cargo and negligent failure of the vessel owner to warn the stevedore of the dangers inherent in the stowage. The review by the Fifth Circuit centered on interpreting *Scindia,* and that court concluded that, although the owner is responsible for eliminating dangers existing when the contractor begins its operations, it has no duty to discover dangerous conditions that develop during those operations. It noted, as had this court in *Scindia,* that the obligation to provide a safe working environment was placed on the contractor as employer of the service crew pursuant to 33 U.S.C. §941. In order for the owner to have an obligation to intervene in the stevedoring, repair, or building operations, he must have actual knowledge of the danger coupled with a realization that the contractor cannot reasonably be expected to alleviate the risk.[12]

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[12]656 F. 2d at 115.

CONCLUSION

The decision of the Court of Appeals for the Sixth Circuit in this matter confronts shipbuilders such as petitioner with substantial dual liabilities to employees engaged in new construction activity. So long as the builder is the owner of the vessel under construction prior to delivery to the purchasing party, it stands exposed for general damages under tort liability for injuries sustained by employees engaged in the construction work, if the particular employee can show that his injury was caused in part by a hazard known to other members of his construction crew. It will not matter if the hazard is one which the employer as builder of the vessel is obligated by applicable safety regulations or industry custom to control; so long as he has the constructive knowledge imputed to him from the co-workers, he will be liable for failing to intervene on the basis of that knowledge. At the same time, he will bear the substantial obligation to pay compensation benefits defined by the Act in question in all circumstances. The resulting dual liability cannot be reconciled with the congressional intent expressed in the statute and the legislative history; it is in conflict with decisions of other circuits which have analyzed the liability of the owner-employer; and it is fundamentally at odds with the decision of this court in *Scindia Steam Navigation*

Co. v. *de los Santos.* A writ of certiorari should issue to the Court of Appeals for the Sixth Circuit to review the issues raised by its decision.

Respectfully submitted,

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IN THE

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

Action No. C 76-0095-L (A)

PAUL ROBERTSON, Administrator of the Estate of
William L. Robertson - - - - - Plaintiff

v.

JEFFBOAT, INC.
1030 East Market
Jeffersonville, Indiana

and

LOUISIANA BARGE COMPANY (May be served at:)
c/o Louisiana Towing Company, Inc.
P.O. Box 4846, Greenville, Mississippi 38701

OR

c/o Louisiana Towing Corporation
2240 Peters Road, Harvey, Louisiana 70058

and

Unknown Defendants - - - - Defendants

FINDINGS OF FACT, CONCLUSIONS OF LAW AND MEMORANDUM OPINION—Entered November 6, 1979

Plaintiff's decedent, William H. Robertson, known as Billy Robertson, was an employee of Jeffboat, Inc. on February 27, 1975, where he was working on the bow of a metal "hopper" barge as part of a sand-blasting crew. The barge was owned by Jeffboat, Inc. While Billy was working

with Arthur Lamb, who was approximately 100 feet from him, Billy disappeared from the barge and drowned. The drowning apparently occurred about 10:30 p.m. Billy was 27 years of age at the time of his death and was earning $5.27 per hour, plus a 15¢ differential when he died. He was not married and his only survivors are his parents and a brother.

No one actually saw Billy fall into the river, and the exact cause of his death is, therefore, unknown. Plaintiff introduced proof which indicated that the river was 8 to 10 feet above its normal pool, and that the current was faster than usual, and that there was debris in the river. The plaintiff also introduced evidence to show that the lighting conditions aboard the barges, and particularly the barge on which Billy was working, were unsatisfactory because of the height of the river. Some of this testimony was rather equivocal. It was established that there were no life rings on either end of the barge, no temporary lighting nor a temporary guardrail.

Billy and his fellow-employees were not wearing life jackets, although the employer introduced evidence to show that there were company rules requiring the wearing of life jackets. The company apparently took no steps to see to it that the rules were complied with in this respect.

The area where Billy was last seen was approximately 4½ to 5 feet wide. There were some cabals located on the barge about the middle of the bow of the barge in the area where Billy was last seen. Billy was pulling a hose which was used for sandblasting, and was walking backwards at the time when he was last seen.

Following Billy's death, there was a hearing held by the Benefits Review Board of the United States Department of Labor, which determined that the decedent's parents were not entitled to compensation benefits under the United States Longshoremen's and Harbor Workers' Compensa-

tion Act. 33 U.S.C. Sec. 901, et seq. That determination was not appealed.

Decedent's parents spent $1,600 for his funeral and Jeffboat reimbursed them in the amount of $1,000. Plaintiff originally brought suit under the Jones Act for negligence and under general Maritime Law for unseaworthiness. Jeffboat was granted summary judgment on these claims, but the plaintiff amended his complaint to allege a claim under 33 U.S.C. 905 (b).

Title 33 U.S.C. Sec. 905(b) represents a revision of 33 U.S.C. Sec. 905 which was enacted in 1927. The statute, taken in conjunction with 33 U.S.C. Sec. 905(a), has been held to provide the following rights and obligations:

1. A longshoreman or repairman who is injured on board a vessel may sue the vessel for negligence of the vessel;

2. The liability of the vessel to the longshoreman or repairman is to be determined by land-based principles and not maritime law;

3. The longshoreman's or repairman's employer is liable only for workman's compensation benefits which have been greatly increased;

4. The vessel is not to be charged with liability for the negligence of those engaged in private stevedoring services;

5. The vessel no longer has a nondelegable duty to provide a safe place to work.

See *Hurst* v. *Triad Shipping Company*, 554 F. 2d 1237, 1241-43 (3rd Cir. 1977); *Gay* v. *Ocean Transp. & Trading, Ltd.*, 546 F. 2d 1233 (5th Cir. 1977); *Napoli* v. *(Transpacific Carriers Corp. and Universal Carriers, Inc.) Helenic Lines, Ltd.*, 536 F. 2d 505 (2nd Cir. 1976); *Griffith* v. *Wheeling Pittsburgh Steel Corporation*, 521 F. 2d 31 (3rd Cir. 1975), cert. denied, 423 U. S. 1054 (1976).

The 1927 Act had provided that the liability of an employer was to be exclusive and in place of all other liability of the employer to the employee, 33 U.S.C. Sec. 905, now 33 U.S.C. Sec. 905(a); however, the Supreme Court scuttled this intent by its decisions in *Ryan Stevedoring Company, Inc.* v. *Pan-Atlantic Steamship Corp.*, 350 U. S. 124 (1956) and *Seas Shipping Sompany* v. *Sieracki*, 328 U. S. 85 (1946), which held that the employee could sue the vessel for unseaworthiness and the vessel could then demand indemnity from the stevedore, thereby resulting in situations where stevedores not only paid compensation to the employee but also paid damages. This 1972 Act preserves the right of the worker to sue the vessel but limits his recovery to negligence created only by the vessel. The vessel is no longer liable under maritime principles, but may be liable under land-based principles. The stevedore receives his *quid pro quo* in that he is no linger liable for workman's compensation and damages, but only for the former.

Where the injured party is an employee of a party which is both the owners of the vessel and the furnisher of repair services, such as in the case here, the courts have held that the employer in its capacity as owner of the vessel, must be governed by Section 343A(1) of the Restatement of Torts 2d which reads as follows:

> "A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, *unless the possessor should anticipate the harm despite such knowledge or obviousness.*" (Emphasis added).

This doctrine was adopted in *Napoli* v. *(Transpacific Carriers Corp. and Universal Cargo Carriers, Inc.) Helenic Lines, Ltd., supra,* and was approved in the case of *Lopez*

v. *A/S/D/S Svendborg*, and D/S of 1912 A/S, 581 F. 2d 319 (2nd Cir. 1978).

In the absence of any Sixth Circuit decision in point since the passage of the 1972 Act, this Court will adopt the more modern trend of opinion embodied in Section 334A, *supra*.

It appears from the principles enunciated above, that Jeffboat, in its role as owner of the vessel, could not be held liable if the only negligence consisted of the failure of the lights on the land to illuminate the barges properly. This would be a failure of its duty as repairman. However, it seems to the Court that there is sufficient evidence of negligence on the part of the vessel, under the principles set out in section 343A to warrant recovery on the part of plaintiff. The owners of the vessel knew that plaintiff would be working at night on a high river on a relatively narrow walkway without making any provisions for lighting on board the barge and without furnishing any life rings or alarm bells.

The instant case is somewhat analogous to that of *Samuels* v. *Empresa Lineas Maritimas Argentinas*, 573 F. 2d 884 (5th Cir. 1978). There the plaintiff was injured when unloading cargo from a vessel. While unloading it, he slipped or stepped backwards into an empty space after getting a drink of water. The opening would have been open and abvious had the area been well-lighted. The ship was being unloaded at night and the injury occurred at night. Some lights had been placed by the stevedore. The testimony was equivocal as to how good the lighting was. There was testimony that if the longshoremen had complained that the hole was too dark to work safely, the work would have been stopped. There was also evidence that the gang foreman complained to ship personnel that they had "pretty dim lights" and work was not stopped.

The court held that there was sufficient evidence for a jury to find that the vessel owner should have realized that there was an unreasonable risk of harm to a longshoreman, should have expect[ed] that the longshoreman would not discover or realize the danger, and failed to exercise reasonable care to make the condition safe or warn the longshoreman of it. See 573 F. 2d at p. 886.

In the instant case, any negligence of the defendant with regard to the life jackets should properly be considered only as negligence of the employer, or stevedore, or repairman, rather than that of the vessel, but even so, and assuming that the bulk of the negligence which caused the decedent's death was that of the repairman rather than that of the defendant in its role as vessel owner, we believe that the vessel owner's negligence with regard to inadequate lighting and failure to supply life rings or alarm bells is sufficient to establish its concurrent negligence.

In the case of *Edmonds* v. *Compagnie Generale Transatlantique*, No. 78-479 decided June 27, 1979, the Supreme Court held that where a jury determined that the longshoreman had suffered total damages of $100,000 while unloading a vessel, and that he was responsible for 10% of the total negligence and that the stevedore's fault contributed 70%, and the shipowner was accountable for 20%, still the longshoreman was entitled to a total award of $90,000. The court held that Congress did not intend to modify the pre-existing rule that a longshoreman who was injured by the concurrent negligence of the stevedore and the ship may recover for the entire amount of his injuries from the ship. See p. 9 of the slip opinion.

The priciple is well settled that even in maritime injuries which have occurred since 1972, a plaintiff's contributory negligence is not a bar to his recovery of damages. See *Edmonds* v. *Compagnie Generale Transatlantique, supra,* and *Samuels* v. *Empresa Maritimas Argentinas, supra.*

In the instant case, plaintiff's decedent's failure to wear a life jacket, knowing of the company's rules and knowing of the hazards which he faced on the barge, leads the Court to attribute 50% of the cause of his death to his own negligence. Had there been no deduction on account of plaintiff's decedent's comparative negligence, the estate would have been entitled to recover $15,000 on behalf of decedent's mother and $15,000 on behalf of decedent's father for the loss of decedent's society.

Defendant contends that plaintiff is not entitled to recover any sum for loss of services or support provided by plaintiff's decedent to his parents. It is true that under the Longshoreman's Act, 33 U.S.C. Sec. 901, et seq., this same claim was made and denied by the appropriate administrative body and that no appeal was taken. However, in the case of *Hamilton* v. *Canal Barge Company, Inc.*, 395 F. Supp. 978 (E.D. La. 1975), former District Judge Alvin B. Rubin, now a Circuit Judge of the United States Court of Appeals for the Fifth Circuit, a judge who has rendered many excellent and definitive opinions in the field of maritime law, held that it is not proper to read a dependency requirement into the *Moragne* v. *States Marine Lines*, 398 U. S. 375 (1970) action for wrongful death. As Judge Rubin points out, neither the Jones Act nor the Death on the High Seas Act require dependency for a parent to recover. Therefore, he reasons that the same principles would apply to the wrongful death action under the general maritime law.

Hamilton, supra, involved a case very much like the instant case in that plaintiff lived with his parents, assisted with household expenditures from time to time, mowed the pasture, and took care of his younger brother, but did not pay rent. In the instant case, the evidence shows that plaintiff performed some services for his parents such as painting and working about the house. The Court concludes that

$3,000 per parent would be a proper allowance for the services and support which plaintiff's decedent rendered his parents during his lifetime. See *Hamilton, supra.* Finally, the total award made to each parent of $18,000 must be reduced by 50% in order to reach the correct amount to be paid them.

Defendant's argument that plaintiff's decedent is barred from asserting a claim for support is without merit, inasmuch as the previous litigation involved the right of the parents as alleged dependents of the decedent. The Act under which they were proceeding required that they show dependency. Since Judge Rubin's opinion in *Hamilton, supra,* indicates that dependency is not required in the action for wrongful death, it, therefore, follows that issues reached in the administrative proceeding and the decision therein are not binding on this Court in this action.

In conclusion, we feel that an award of $18,000 reduced by 50% would be appropriate for each parent. Unreimbursed funeral expenses should be added to these amounts in the sum of $600. We observe that in *Mobil Oil Corp.* v. *Higginbotham,* 436 U. S. 68 (1978), 98 S. Ct. 2010, the Supreme Court was not asked to pass upon what is designated as "large sums that the District Court would have awarded for loss of society." In that case the large sums were $50,000 for a surviving spouse and $20,000 for older children of a deceased husband.

We have this day entered a final judgment in accordance with this opinion.

Dated 11-6-79

(s) Charles M. Allen
Chief Judge

cc: Counsel of Record

JUDGMENT—Entered November 6, 1979

This action, having been tried to the Court without a jury, and the Court, having entered its findings of fact, conclusions of law and memorandum opinion and being fully advised in the premises,

IT IS ORDERED AND ADJUDGED that plaintiff, Paul Robertson, Administrator of the estate of William H. Robertson, recover from defendant, Jeffboat, Inc., the total sum of $18,600, said sums to be paid in equal amounts to the parents of William H. Robertson.

Plaintiff is also entitled to recover his costs herein expended.

This is a final and appealable judgment and there is no just cause for delay.

Dated 11-6-79

(s) Charles M. Allen
Chief Judge

cc: Counsel of Record

MOTION TO RECONSIDER

Comes the Plaintiff, by counsel, and moves this honorable Court to reconsider and amend its Judgment dated November 6, 1979 in the following respects:

(1) To include a funding and award for lost wages due the estate of William Robertson.

(2) To amend the Judgment and find that the deceased's own negligence should not reduce the damages awarded the parents by 50%. There was unrefuted testimony that the

condition of the river was such that even had the deceased worn a life jacket he would not have survived.

/s/ J. Daniel Landrum
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ORDER—Entered December 19, 1979

The court being advised plaintiff's Post-Trial Motion directed to the reconsideration of the case and a modification of the Judgment entered November 6, 1979 is overruled.

/s/ Charles M. Allen
Chief Judge

12-29, 1979

No. 80-3136

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PAUL ROBERTSON, Administrator of the Estate of William L. Robertson, - *Plaintiff-Appellee,*

v.

JEFFBOAT, INC., - - - - *Defendant-Appellant.*

On Appeal from the United States District Court for the Western District of Kentucky

---

Decided and Filed June 19, 1981

Before: WEICK and MERRITT, Circuit Judges; GILMORE, District Judge.*

MERRITT, Circuit Judge. Defendant, Jeffboat, Inc., a shipbuilder, appeals the district court's finding that its negligence contributed to the death of plaintiff's decedent, William Robertson. Jeffboat was Robertson's employer and the owner of a barge he was helping build at the time of his death. The court below based an award to Robertson's parents on 33 U.S.C. § 905(b), a provision of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* (LHWCA). We agree with the reasoning of District Judge Allen, and affirm the judgment below.

*The Honorable Horace W. Gilmore, Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

Robertson drowned after falling off a nearly-completed barge that he was sandblasting in preparation for painting. The accident occurred after dark, and no one saw or heard him fall into the water. Trying the case without a jury, the district court found that Jeffboat was negligent both in its capacity as employer and as vessel owner, but it is only liability in the latter capacity that is relevant here. It found that Jeffboat's provision of "inadequate lighting and failure to supply life rings or alarm bells is sufficient to establish its . . . negligence" as vessel owner. Applying a comparative negligence doctrine that reduced plaintiff's recovery by fifty percent, the court awarded $18,600 in damages.

Plaintiff based his claim against Jeffboat on 33 U.S.C. § 905 (b), which in pertinent part provides:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel. . . . If such person was employed by the vessel to provide ship building or repair services [as in this case], no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing shipbuilding or repair services to the vessel [as distinguished from the negligence of the owner of the vessel in its capacity as owner]. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred.

The amendments to the LHWCA replaced the worker's former right to sue for injuries caused by the employer's negligence with an expanded unemployment compensation benefits program funded by the employer. Workers retained the right to sue vessel owners for injuries caused

by the owner's negligence, even where the owner is also a shipbuilder employer of the injured workman. Those changes are reflected in § 905(b). In this case Jeffboat is both owner and employer, but the statutory structure requires that negligence in the two capacities be distinguished. *See Smith* v. *Eastern Seaboard Pile Driving, Inc.*, 604 F. 2d 789, 795 (2d Cir. 1979).

The legislative history to the 1972 amendments makes clear that § 905(b) incorporates land-based principles of liability. H.R.Rep.No. 92-1441, *reprinted in* [1972] U.S. Code Cong. & Ad. News 4698, 4703. The shipowner is not strictly liable for injuries suffered by longshoremen working on its ship. In *Scindia Steam Navigation Co.* v. *Santos*, 49 U.S.L.W. 4405 (April 21, 1981), a decision issued after oral argument in this case, the Supreme Court determined the principles applicable to suits by longshoremen against shipowners. The Court concluded that while "the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop" after stevedoring operations have begun, 49 U.S.L.W. at 4410, it does owe a duty of care to workers for dangerous conditions of which it has actual knowledge. In the case, the Court affirmed the Court of Appeals' reversal of summary judgment granted to the shipowner against a longshoreman injured by a malfunctioning winch. It remanded the case, *inter alia*, for further inquiry into the factual question of whether the shipowner had actual knowledge of any defect in the winch that developed after the shipowner relinquished control to the stevedore.

In the instant case as well, liability turns on the shipowner's knowledge of dangerous working conditions, and on the foreseeability of the harm they might cause. As Jeffboat argues, its liability in this case must be based upon its negligence as owner rather than employer, and its ac-

tions in the two capacities must therefore be kept distinct. The question is whether the knowledge of defendant as shipbuilder that the employee would be working on the ship at night without adequate lighting or railings to protect him from falling is the kind of knowledge that can also be attributed to defendant as owner. Because Jeffboat *is* both owner and employer, any knowledge chargeable to it as employer must also be attributed to it as owner. What the employer knew, the owner knew. The district court was not clearly in error in concluding that Jeffboat should have anticipated the harm that inadequate lighting and the absence of safety measures might cause.

Accordingly, the judgment of the district court is affirmed.

ORDER DENYING PETITION FOR REHEARING—
Filed September 20, 1981

Before: WEICK and MERRITT, Circuit Judges; GILMORE, District Judge.*

A majority of the court having not voted in favor of an en banc rehearing, the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT.

/s/ John P. Hehman
Clerk

*The Honorable Horace W. Gilmore, Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

Opposition

FILED
JAN 13 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-935

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JEFFBOAT, INC.

Petitioner,

v.

PAUL ROBERTSON, ADMR., etc.

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent submits that the Petition for a Writ of Certiorari to the Court of Appeals for the Sixth Circuit presents the following questions for review:

1. Whether the District Court was clearly erroneous in finding the Petitioner had as vessel owner actual knowledge of an unreasonable risk of harm to the Respondent's decedent?

2. Whether a claim against an employer under the United States Longshoremen's and Harbor Worker's Compensation Act limited by 33 U.S.C. §905(a) excludes a cause of action against that same party as a vessel owner under 33 U.S.C. §905(b)?

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STATEMENT OF THE CASE

The facts of this case are adequately set forth in the decisions of the District Court (Petitioner's Appendix, at 17-19) and the Court of Appeals (Petitioner's Appendix, at 27-28).

ARGUMENT

The decision of the Court of Appeals is based squarely on the holding of this Court in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. ____, 101 S.Ct. 1614 (1981), that a vessel will be held liable for its actual knowledge of

dangerous conditions arising from the condition of the vessel's equipment which present an unreasonable risk of harm to workers, and in such circumstances the vessel has a duty to intervene by either halting the stevedoring operation or by eliminating the unsafe condition.

Mr. Justice White further described the duty of the vessel owner in that case thusly:

> [T]he vessel owes to the stevedore and his longshoremen employees the duty of exercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its...operations with reasonable safety to persons and property and to warning the stevedore of any hazards on the ship or with respect to its equipment [or lack of it as in this case] that are known to the vessel or should be known to it in the exercise of reasonable care....451 U.S. ___, 101 S.Ct. at 1621; See also *Griffith v. Wheeling Pittsburgh Steel Corp.*, 657 F.2d 25 (3d Cir. 1981).

Petitioner's argument for the granting of a Writ of Certiorari is that the Court of Appeals failed to distinguish between its roles as both shipbuilder and vessel owner. However, the Court of Appeals specifically recognized that "the statutory structure requires that negligence in the two capacities be distinguished." (Petitioner's Appendix, at 29).

The Court of Appeals affirmed the District Court in part on the basis that "the knowledge of the defendant as shipbuilder that the employee would be working on the ship at night without adequate lighting or railings to protect him from falling is the kind of knowledge that can also be attributed to defendant as owner." (Petitioner's Appendix, at 30).

Respondent introduced at trial the testimony of experts and that of Petitioner's own employees who established that the work area from which the decedent fell was indeed

hazardous. This evidence is cited in part in the District Court's Findings of Fact thusly:

> Plaintiff introduced proof which indicated that the river was 8 to 10 feet above its normal pool, and that the current was faster than usual, and that there was debris in the river. The Plaintiff also introduced evidence to show that the lighting conditions aboard the barges, and particularly the barge on which Billy was working, were unsatisfactory because of the height of the river....It was established that there were no life rings on either end of the barge, no temporary lighting nor a temporary guardrail....The area where Billy was last seen was approximately 4½ to 5 feet wide. There were some cabals located on the barge about the middle of the bow of the barge area where Billy was last seen. (Petitioner's Appendix, at 18).

The District Court found that the Petitioner could not be held negligent in its role as the vessel owner for the failure of its lights on land to properly illuminate the barges nor could it be found negligent in its failure to provide the decedent with a life jacket since both of these breaches of duty to the decedent were committed in the Petitioner's role as a repairman. However, the District Court did find the Petitioner liable under 33 U.S.C. §905(b) since:

> The owners of the vessel knew that Plaintiff would be working at night on a high river on a relatively narrow walkway without making any provisions for lighting on board the barge and without furnishing any life rings or alarm bells. (Petitioner's Appendix, at 21).

Certainly, the Court of Appeals could not have found the findings of the District Court clearly erroneous based on the aforesaid evidence introduced at trial. The dispute is not that the Petitioner did not know of the hazardous conditions awaiting the decedent, but that its knowledge was strictly acquired in its role as a shipbuilder not as a vessel owner. This "legal fiction" introduced by the

Petitioner to extricate itself from paying any damages to the estate of the decedent for its proven negligence is clearly "a distinction without a difference."

It is true that the immunity provided employers under 33 U.S.C. §905(a) applies to shipbuilders whose employees are injured solely as the result of the negligence of other employees who are performing strictly shipbuilding or repair services. In *Richardson v. Norfolk Shipbuilding And Drydock Corp.*, 621 F.2d 633 (4th Cir. 1980), the shipbuilder was absolved from liability under 33 U.S.C. §905(b) since the c ıse of the Plaintiff's injuries was due to the negligent operation of a crane by an employee engaged solely in repairman services. The Court of Appeals for the Fourth Circuit held that the negligent act of the employee could not be imputed to the employer as a vessel owner.

Petitioner's negligence in the case at bar however is not the isolated act of an employee engaged in shipbuilding; but lies instead in the Petitioner's actual knowledge as both shipbuilder and as vessel owner of dangerous conditions existing on and off the vessel which together produced a forseeable unreasonable risk to the Respondent's decedent.

In *Sarauw v. Oceanic Navigation Corp.*, 655 F.2d 526 (3d Cir. 1981), the Court of Appeals citing this Court's reasoning in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. at ____, 101 S.Ct. at 1624, found a vessel owner liable under 33 U.S.C. §905(b) for the injuries sustained by a longshoremen upon a defectively secured gangway which was supplied by the stevedore and which was to be used for stevedoring operations. The Court held that the vessel owner was responsible for securing and maintaining the gangway even though the gangway was supplied and intended for use by the stevedore.

The Court of Appeals found that the gangway had become an appurtenance of the vessel and that the vessel owner had a duty to use reasonable care to inspect the gangway for the purpose of discovering and remedying

dangerous conditions. This gangway as the only means of access to the vessel could have been used by the vessel's crew and others having business on the vessel besides longshoremen.

In this case, the vessel owner had actual knowledge of the poor lighting system, the adverse river conditions, and the narrow area upon which persons could be walking along the inside of the vessel. Certainly, it is not hard to visualize some visitor such as the decedent's brother, who visited the barge shortly after his brother's death, falling over the side due to the same poor lighting conditions.

Finally, there is no merit in the Petitioner's argument that a finding of negligence against the Petitioner under 33 U.S.C. §905(b) as a vessel owner effectively eliminates his protection as an employer under the exclusive remedy provision of 33 U.S.C. §905(a).

The Petitioner should take his own advice by drawing a distinction between the employer's capacity as a shipbuilder and as a vessel owner which the Court of Appeals did in this case.

Regardless, this Court in *Edmonds v. Compagnie Generale Transatlantique*, ___ U.S. ___ , 99 S.Ct. 2753 (1979) held that an injured harbor worker may recover from a vessel for negligence even if the vessel owner is his employer under 33 U.S.C. §905(b) which states in part: "If such person was employed by the vessel to perform stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel."

Mr. Justice White further held in that case thusly:

> The second sentence of the paragraph is expressly addressed to the different and less familiar arrangement where the injured longshoremen loading or unloading the ship is employed by the vessel itself, not by a separate stevedoring company-in short, to the situation where the ship is its own stevedore. ___ U.S. at ___, 99 S.Ct. at 2758.

CONCLUSION

This Honorable Court should deny the Petition for a Writ of Certiorari primarily because the decision of the Court of Appeals for the Sixth Circuit is in accordance with this Court's recent decision in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. ____, 101 S.Ct. 1614 (1981).

Petitioner's concern expressed in the conclusion of its Petition that the shipbuilders will face a dual liability due to the decision of the Court of Appeals does not apply in this case since the decedent's parents were denied compensation benefits by the Benefits Review Board of the United States Department of Labor under the United States Longshoremen's and Harbor Worker's Compensation Act. 33 U.S.C. §901, et seq. (Petitioner's Appendix, at 18-19).

WHEREFORE, Respondent respectfully prays that a Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE

I hereby certify that a copy of the foregoing brief was served upon each party required to be served by mailing true copies thereof to: Robert M. Contois, Jr., Jones, Walker, Waechter, Poitevent, Carrere & Denegre, 225 Baronne Street, 28th Floor, New Orleans, Louisiana 70112 and to Albert F. Reutlinger, Middleton & Reutlinger, 501 South Second Street, Louisville, Kentucky 40202, Co-Counsel for the Petitioner. This 11th day of January, 1982.

Daniel M. Kininmonth

DANIEL M. KININMONTH